Date: November 5, 1996

Case No.: 95-INA-75

In the Matter of:

WASHINGTON CLINIC,
Employer

On Behalf Of:

SEVED HASSAN YOUSOFI,
Alien

Appearance: Delores Blough, Esq.
For the Employer/Alien

Before: Huddleston, Jarvis, and Vittone
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On November 18, 1993, the Employer filed an application for labor certification to enable the Alien to fill the position of Office Manager at a yearly wage of $31,500, in a medical clinic that offers both dental and chiropractic services. The minimum experience required to perform this job was listed as two years in the job offered and an additional special requirement was added that required the job holder to be bi-lingual in Farsi and English (AF 47-50). The job duties for the position were described as follows:

> Coordinate activities of personnel in Office; Analyze & organize office operations and procedures such as Bookkeeping, preparation of payroll, and clerical services. Prepare organizational budget and monthly financial reports.

On May 6, 1994, the CO issued a Notice of Findings in which he concluded, *inter alia*, that the application for labor certification was deficient because the foreign language requirement is unduly restrictive (AF 32-35). In the NOF, the Employer was informed that it could rebut this finding by submitting evidence that showed that the requirement for the Farsi language arises from a business necessity rather than the Employer's convenience. The CO set forth the general guidelines for establishing business necessity and also listed seven areas of specific questions that the Employer needed to address. The Employer was also provided the option of removing the foreign language requirement.

On June 3, 1994, the Employer submitted rebuttal to those findings, consisting of a list of its clientele's surnames and a statement from one of the two owners (AF 21-31). On September 13, 1994, the CO issued a Final Determination in which he concluded that the Employer had failed to rebut his finding that the foreign language requirement was unduly restrictive (AF 16-20). He concluded, based on the job duties listed for the position and the fact that office workers and the two owners were fluent in Farsi, that the evidence did not support the Employer's argument that the Office Manager was also required to know this language. On October 18, 1994, the Employer requested review of that denial before an Administrative Law Judge (AF 1-15).

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

DISCUSSION

Section 656.21(b)(2)(i)(C) provides that the job opportunity shall not include a requirement for a language other than English unless that requirement is adequately documented as arising from business necessity. The Employer was informed that it must document that the job requirement: (1) bears a reasonable relationship to the occupation in the context of the employer's business; and, (2) is essential to perform the job in a reasonable manner. See *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*); § 656.21(b)(2)(i). The *Information Industries* standard is applicable to a foreign language requirement. See *Coker's Pedigreed Seed Co.*, 88-INA-48 (Apr. 19, 1989). As applied to foreign language requirements, the first prong of the *Information Industries* standard requires the Employer to establish that a significant percentage of its business includes clients, co-workers, or contractors who speak the foreign language at issue. *Raul Garcia, M.D.*, 89-INA-211 (Feb. 4, 1991); *Felician College*, 87-INA-553 (May 12, 1989) (*en banc*). The law is not absolute on what percentage constitutes a significant percentage of business. We have held that one business that is dependent on 20% to 30% use of Farsi has a significant percentage of its business at stake. *Mr. Isak Sakai*, 90-INA-330 (Oct. 31, 1991). Other cases have indicated that a foreign language clientele of 23% is not significant. See *Washington International Consulting Group*, 87-INA-625 (June 3, 1988).

In the case at hand, the Employer submitted a list of clinic patients and a letter from one of the owners, a chiropractor (AF 22-30). Dr. Yousefi stated in this letter that 800 of the 2,540 patients seen in the past six months, or 32%, were native Iranians. However, in a somewhat contradictory vein, Dr. Yousefi stated in the same letter that 85% of the list contains Iranian names. Notwithstanding these disparate figures, which may indicate that not all the patients with Iranian names are actually native to that country, we still find that 32% native speakers constitute a significant percentage of its clientele who speak Farsi. The Employer has, therefore, met the standards for the first prong of the business necessity test.

The second prong of the test requires that the Employer establish that the use of Farsi is essential for the office manager to carry out the job duties in a reasonable manner. In rebuttal, the Employer argues that both of the doctors who own the business - one a dentist, the other a chiropractor - believe strongly that they would lose patients if their staff were not able to communicate in their native language. Dr. Yousefi stated in his letter as follows:

> Although some of those clients [the 32% who are native Iranians] have at least a limited knowledge of English, most prefer to communicate in their native Farsi and, if Farsi is not available to them at this office, they would most definitely seek other medical assistance.
>
> Because the office manager is responsible for keeping the books, and supervising all front desk activity, he must often communicate with the clients. At times he needs to intervene with misunderstandings between clients and staff, other times he needs to clarify financial matters or contact clients about making satisfactory payments. It is difficult to identify the exact number of hours he might need the Farsi, but a reasonable guess may be 25% of his overall time.

We find that the Employer has failed to persuasively establish that the office manager's job duties, as described in the application for labor certification, and as elaborated in the rebuttal response, make it essential for this employee to be fluent in Farsi. The Employer has been able to cite occasional problem solving, billing explanations in special circumstances, or emergency telephone answering. It is not credible that with an estimated Farsi-speaking clientele of 32%, the Employer's business is dependent on an office manager's ability to speak Farsi, when that employee's job duties include occasional and irregular patient contact. In its brief, the Employer cites *Alwya Computer Corp.*, 88-INA-218 (Sept. 21, 1989), in which certification was granted to a financial controller. Although the Employer argues that the duties were similar, the case reveals a different reality. In *Alwya*, all of the company's import business took place in Taiwan and the financial controller was responsible for negotiating contracts in Chinese.

We conclude that the Employer has failed to meet the standards for the second prong of the business necessity test. Thus, the CO's denial of labor certification must be AFFIRMED.

ORDER

The Certifying Officer's Denial of Labor Certification is hereby AFFIRMED.

Entered this the _____ day of November, 1996, for the Panel:

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Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decisions, or **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.